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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 286

L. BUFORD HALL, L. FELTON HALL,
AND ERNEST W. HALL,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1964

No.

L. BUFORD HALL, L. FELTON HALL,
AND ERNEST W. HALL,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on the 16th day of April, 1964.

OPINION BELOW

The opinion of the Court of Appeals is reported at 330 F. 2d 558 and is reproduced in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on the 16th day of April, 1964. Petitioners filed a timely petition for a rehearing which was denied without further opinion on the 22nd day of May, 1964. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

1. Is it a denial of due process under the Fifth Amendment to fail to charge the jury that an essential element required in order to establish violation of 18 USC 111 (assaulting a federal officer) is that the accused knew at the time of the violation that the victim was a federal officer engaged in the performance of his official duties, when the evidence clearly presents a question of fact as to whether the accused did or did not know the victim was a federal officer so acting?

2. Does a charge containing the statutory presumptions established by section 5601 (b) of the Internal Revenue Code violate the provisions of the Fifth Amendment in a prosecution of one charged with violating sections 5601 (a) (1) and 5601 (a) (7) of the Internal Revenue Code?

3. Assuming question number 2 is answered in the negative, is it a denial of due process of law under the Fifth Amendment for such presumptions to be charged in a circumstantial evidence case where the basic fact, i.e. presence, upon which the presumption depends has to be inferred from such evidence?

4. Is a general criminal sentence imposed on one convicted on all counts of a multiple court indictment such a plain, unequivocal and certain judgment of conviction as to meet the requirements of Rule 32 (b), Federal Rules of Criminal Procedure and procedural due process under the Fifth Amendment?

5. Assuming question 1 hereinabove is answered in the affirmative, is it a denial of due process under the Fifth

Amendment to allow a general sentence imposed as to conviction on four counts to stand when the conviction as to one of said counts, different in nature from the rest, is illegal?

6. Assuming either question 2 or question 3 hereinabove is answered in the affirmative, is it a denial of due process under the Fifth Amendment to allow a general sentence imposed as to conviction on four counts to stand when the conviction as to two of said counts, different in nature from the rest, is illegal?

7. Assuming question 1 and either question 2 or question 3 hereinabove is answered in the affirmative, is it a denial of due process under the Fifth Amendment to allow a general sentence imposed as to conviction on four counts to stand when the conviction as to three of said counts, different in nature from the rest, is illegal?

STATUTES INVOLVED

Section III of Title 28 USC provides in pertinent part:

Whoever forcibly assaults, resists, opposes, impedes, intimidates or interferes with any person designated in Section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000.00 or imprisoned not more than three years or both.

Who, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000.00 or imprisoned not more than ten years or both.

Rule 32, Federal Rules of Criminal Procedure provides in pertinent part:

(b) Judgment. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence.

Section 5601 of the Internal Revenue Code of 1954 provides in pertinent part:

"Presumptions —

Unregistered stills — Whenever on trial for violation of Subsection a(1) the defendant is shown to have been at the site or place where and at the time when a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction unless the defendant explains such presence to the satisfaction of the jury.

Unlawful production, removal or use of material fit for production of distilled spirits — Whenever on trial for violation of Subsection a(7) the defendant is shown to have been at the place, in the building or on the premises where such mash, wort or wash fit for distillation for the production of distilled spirits was made or fermented and at the time such mash, wort or wash was there possessed, such presence of the defendant shall be deemed sufficient evidence to authorize conviction unless the defendant explains such presence to the satisfaction of the jury."

STATEMENT

After a jury trial in the United States District Court for the North District of Georgia, petitioners were convicted on all four counts of a four-count indictment (R.). Count One charged them with assaulting a federal officer with a

deadly weapon; Count Two with possessing and having in their custody an unregistered distillery; Count Three with making and fermenting mash on premises other than a registered distillery; and Count Four with possessing a quantity of non tax paid distilled spirits.

General sentences of five years, four years, and two years in the custody of the Attorney General were imposed on L. Buford Hall, L. Felton Hall and Ernest W. Hall, respectively.

The Court of Appeals in a per curiam opinion affirmed, holding, in effect, that since convictions on Counts One and Four were proper and that the sentences imposed did not exceed the maximum that could have been imposed, it was unnecessary to reach a decision on the alleged errors as to Counts Two and Three.

The evidence for the government was substantially as follows:

About 8:00 o'clock P.M., after dark, three federal agents and the Chief of Clayton County police were investigating an illicit distillery located in a wooded area. A large unidentified truck was observed at the still, and several unidentified men seen going from the truck to the still. About 10:30 P.M. the truck was started up, and Investigator Howell separated from Chief Smith. There was a fence running along the edge of the wooded area, with a gap in it. The wooded area, where the still was located, was to the left of the fence, and a large pasture was located on the right side eventually leading into a public road. The truck was then seen to leave the place near the gap in the fence, without lights, and head in the direction of the public road. Investigator Howell stepped in front of the truck, turned

his flashlight on and hollered out that he was a federal officer and ordered the driver of the truck to stop. The truck lights came on, and the truck speeded up. The Investigator then jumped on the side of the truck nearest the passenger side and again identified himself. He then testified that he was then pulled into the cab of the truck and struck around the face and head. The truck continued on and crashed through a gap in the fence on the main entrance to the public road. The Investigator then pulled his gun and placed it in the window of the truck, ordering the driver again to stop. His arm was seized and the Investigator then emptied his revolver into the bodies of the occupants of the truck. The truck proceeded across the public road, and scraped the Investigator's body along side a barbed wire fence. He was then knocked unconscious.

It was stipulated by the government that U. S. Exhibit No. 1 was a correct survey of the location, without the topography, and that from the location of the road as shown on the diagram that one could not see the area where the still road was located, and that from the point where the truck and cattle chute were located the distillery nor the distillery path can be seen.

Articles of clothing were taken from the appellants upon their admission into the hospital. The boots identified to have been removed from one of the appellants feet were described as being similar in appearance to foot prints taken near the still, and a shovel later found in a truck identified as belonging to the appellants had a certain flourescent trace on its handle which had been previously placed at the still by federal agents.

The still was seized by other federal agents, and a quantity of non-tax paid distilled spirits was found at the same

location, and a quantity of fermenting mash was earlier seen at this same location fit for distillation.

The evidence for appellants was substantially as follows: They had not been to the still and knew nothing about it; that when they were observed at the time of the shooting they were in the process of coming from another direction where they had been fishing in a creek; that the "dough-like substance" found in the truck and on some of their clothing was a mixture of flour and meal used by them that evening to make "dough-balls" used for fishing in that area. One of the appellants testified that when they had left their fishing place just prior to coming to the fence that marks the public road he was blinded with a pistol blast; that he saw no one in front of the truck; that he heard no one holler and saw no flashlight prior to this time; that the pistol shots came from the direction of the right window and that he heard five shots in all; that the three appellants were all seated in the front seat of the truck and that all five bullets entered their bodies; and that appellants did not know the man who was firing the shots into the truck was a federal agent.

A motion for a judgment of acquittal on all counts on the ground the evidence was insufficient to authorize a conviction was made and overruled at the conclusion of the evidence for the government and renewed at the conclusion of all the evidence in the case.

Exceptions to the charge of the court were taken on the following items: (1) On the use of a deadly or dangerous weapon; (2) failure to define or charge on the rule of self-defense; and (3) the charge of the court as to presence at the distillery raising a presumption against a defendant

in that the presence in this case was based upon circumstantial evidence.

After a long deliberation the jury requested a recharge on the assault count of the indictment, and exceptions were taken to this recharge on the ground that the court failed to instruct the jury that in order to authorize a conviction the jury would first have to believe that defendants had knowledge that the person assaulted was a federal officer and that such officer was in the official discharge of his duties.

In commenting on the consideration the jury should give the "presumptions" provided by 26 U.S.C. 5601(b), supra, the trial judge gave the following instructions (R.):

> "Now with respect to the second and third counts in this indictment, the Court instructs you that whenever, on the trial for possessing an unregistered distillery, and making or fermenting mash fit for distillation, or for the production of distilled spirits, on premises other than a lawfully qualified plant, the defendant is shown to have been at the site or place at the time when a still or distilling apparatus is set up without having been registered, or where such mash fit for distillation or for the production of distilled spirits was made or fermented, or was there possessed, such presence of the defendant shall be deemed sufficient evidence to authorize a conviction, unless the defendant explains such presence to the satisfaction of the jury.
>
> This does not mean that the presence of the defendant at the site and place at the time referred

to requires the jury to convict the defendant if the defendant fails to explain such presence to the satisfaction of the jury; it simply means that the jury may, if it sees fit, convict upon such evidence, as it shall be deemed in law sufficient to authorize such conviction, but does not require such a result.

Now, in giving you in charge this principle of law the Court does not mean to intimate that the evidence here has shown the presence of these three defendants at this distillery.

It is the contention of the government here that they have introduced circumstantial evidence sufficient to authorize you to find that these three men were at that distillery. It is the contention of the defendants in this case that that is not correct; that the circumstances are not sufficient to authorize you to find that they were at the distillery.

In giving you this principle of law, I instruct you that unless you do find from the evidence in the case that these defendants were actually at the distillery, then this principle of law would not be applicable. If you find that the evidence is insufficient to authorize you to find that has been established to a moral and reasonable certainty and beyond a reasonable doubt, then you would disregard this entirely and give no consideration to it."

The court, however, failed to charge as to count one that *knowledge* on the part of the defendant that a person assaulted *was* a federal officer and *in* the discharge of his du-

ties was an essential element to the offense charged. It should be pointed out that while the government did offer evidence that the person allegedly assaulted stated that he was a federal officer, there was other evidence under oath to counteract such, which of necessity created a positive issue.

REASONS FOR GRANTING THE WRIT

This case involves important areas from the standpoint of the administration of the criminal laws which should be clarified and all doubt removed by this Court. Firstly, the important question of scienter insofar as federal prosecutions under 18 USC 111 and similar statutory provisions. Secondly, the constitutionality of the presumptions established by Congress in Sec. 5601(b) of the Internal Revenue Code. Thirdly, the requisites of a Criminal Sentence.

1. One of the landmark cases insofar as scienter is concerned is that of *Pettibone v. United States,* 148 US 197, which holds that scienter in a case of this type is necessary. This Court in commenting on those cases dealing with forcibly obstructing or impeding an officer of the customs in the discharge of his duty stated that "In cases of that sort it is the official character that creates the offense and the scienter is necessary". *Pettibone v. United States,* supra, at page 205. However, the appellate Court below failed to follow this principle.

Further, it is significant to note the conflict existing in the decisions of the Court of Appeals for the Fifth Circuit itself insofar as scienter in a case of this type is concerned. In *Hargett v. United States,* 183 F. 2d 859, the Fifth Circuit had directly before it this issue. There the trial court had charged the jury that if the defendants did act for the pur-

pose of obstructing or impeding any person, whoever he might be, who later turned out to be a federal officer involved in the discharge of his duty, then the defendants had committed a federal offense under the law. Such charge was held to require a reversal of the judgment, the Court holding "If scienter was a requisite to due process of law, then, without question, the motion of the defendants for an acquittal should have been sustained and the charge of the court above mentioned was erroneous". Similarly, the Fifth Circuit has construed scienter as a material ingredient of a statutory offense relating to obstruction of justice in other cases. See *Odom v. United States,* 116 F. 2d 996; *Palmquist v. United States,* 149 F. 2d 352, and *Carter v. United States,* 231 F. 2d 232.

The Fifth Circuit also stated in HARGETT that "The United States should have been required to prove that the defendants knew or had knowledge of such facts as to put them definitely on inquiry, that the circling car contained federal officers in the discharge of their duty before a conviction could have been sustained".

However, the Fifth Circuit in *Bennett v. United States,* decided December 28, 1960, 285 F. 2d 567, held, in effect, that the statute making it an offense to forcibly resist, oppose, impede, intimidate or interfere with designated officers of the United States while engaged in their official duties does not require that the doer of the act have knowledge that the person whom he acted against is a federal officer. The conflict within this circuit is thusly apparent.

The failure of the trial court below to charge adequately on the question of scienter amounted to a denial of due process inasmuch as such, under the holdings of *Pettibone v. United States,* supra, and cases similar, is a requisite to

due process of law in a federal prosecution of one charged with a violation of this and similar statutes. For the sake of uniformity, any doubt and confusion should be removed.

2. Of equal importance in the administration of criminal justice in the federal courts is the question of whether or not the presumptions contained in Sec. 5601 (b) of the Internal Revenue Code, cited herein, are unconstitutional under the Fifth Amendment as not having the requisite rational connection between the fact proved and the ultimate fact to be presumed.

Significantly, the Court of Appeals for the Fifth Circuit held in the case of *Barrett, et al v. United States of America*, 322 F. 2d 292, decided September 5, 1963, that said statutes were unconstitutional. Apparently recognizing the conflict among the circuits which have heretofore applied this presumption statute, this Court, under date of January 6, 1964, 11 L.Ed. 2d 413, granted certiorari on the petition of the United States to review the judgment of the Court of Appeals for the Fifth Circuit in the BARRETT case, and such, petitioners understand, is set for argument at the October 1964 term of this Court.

In view of the peculiar circumstantial factual situation in the case under consideration and with particular reference to the opinion of the Fifth Circuit below (see appendix, pages 17, 18), certiorari should be granted herein for a determination of the constitutionality of the presumption statutes by this Court.

The evidence against the petitioners on the trial of the case as to counts two, three, and four was circumstantial. It is impossible to ascertain the effect of the charge as to the presumption statutes on the jury in their consideration

of each count separately and individually. Due process of law requires that the jury receive adequate, clear instructions as to the offense charged in each count of a multiple count indictment and treat each accordingly in their consideration. This is especially true in a case as this when viewed against *Bozza v. United States,* 330 US 160, 67 SCT. 645, which holds that when separate stages of the distilling process are made separate offenses, it is necessary to show each defendant's participation in each process.

While the Court of Appeals for the Fifth Circuit in *Barrett v. United States,* supra, was considering a direct evidence case, yet, it still found the presumption statutes to be unconstitutional. Where as here, the basic fact from which the presumption arises is sought to be established by circumstantial evidence, such is even more reason for holding that there is no rational connection between the fact proved and the ultimate fact presumed. Such, in effect, would amount to allowing an inference to rest upon an inference and clearly breaks the chain of "reasonableness" as the Court of Appeals in *Barrett* found the criteria to be, certainly, under the holding in *Tot v. United States,* 319 US 463, such can under no circumstances afford a "rational connection" between the fact proved and the fact presumed.

Even taking into account and drawing upon its experience in human affairs, Congress could not be justified in concluding that a person apprehended, not *at* the site of an illicit distillery but only *near,* would invariably be a participant both in the distilling business and in the possession of the still and any whiskey found thereat. Possession of a thing such as these involves the highly technical legal concept of dominion and control.

Here, presence was not proven, only inferred from the circumstances. Yet, the government would have the Courts to hold that such is the basis for presuming from such inferred presence the highly technical concept embodied in possession.

3. Of added importance in view of the factual situation as shown by the record is the imposition herein of general sentences. It is noted that under one section of 18 USC 111 the maximum sentence of imprisonment is three years, while under another it is ten years. Significantly, the Court of Appeals for the Fifth Circuit in Case No. 21300, *Benson v. United States,* decided May 28, 1964, but as yet unreported, struck down a general sentence of fifteen years on a defendant based on his conviction on a plea of guilty to a three-count indictment charging violations of 18 USC 1708 and 495. Had the maximum sentence been imposed consecutively on each count, the penalty would have been 5-10 years, aggregating 25 years. *Benson* clearly pointed out that a criminal sentence should be so plain, unequivocal and so free from doubt that those concerned — the accused, the sentencing court, the reviewing court and the prison authorities — will know precisely what the punishment is. True, in the *Benson* case, the general sentence was for a total term greater than the maximum under any one count. Here, however, the maximum as to the petitioners Buford Hall and Felton Hall exceeded the maximum that could, for example, have been imposed under Count One had the jury found that a deadly weapon had not been used.

The remaining questions concern themselves with the effect of a general sentence in those cases where convictions under one or more of the counts in the indictment are, for one reason or another, void. Such is especially true when as

here the two basic crimes are unrelated. The illicit distilling process falls in one category. Assaulting a federal officer definitely falls in another.

No doubt the sentencing court assumed the convictions on all counts valid. Would it have entered a different sentence had an acquittal been returned as to one count, two counts or three counts? We think such is reasonably probable and should be resolved in favor of petitioners. See the colloquy between the trial judge and counsel for petitioners at the time of sentence (R.) when the trial judge stated:

> "This is a matter that has troubled the court, Mr. Asinof. We do not have many law violators who align themselves as being against the officers from the standpoint of undertaking to resist, figrt, and it brings into the Court's problem just a little different situation.
>
> "I think that as to Mr. William Hall, if it were not the character of the offense that it is that he would merit probation in this case.
>
> "Under the circumstances, the Court will commit . . ."
>
> (Then follows the imposition of sentences)

The foregoing emphasizes the evil of a general sentence when convictions as to some of the courts are, in effect, voided as was done, we submit, by the appellate court in this case when they refused to review said convictions as to counts 2 and 3. See opinion, appendix. Neither petitioner now knows his status under his respective sentence as to counts 2 and 3.

This confusion and doubt should be removed by this court for the sake of these petitioners as well as those subsequently convicted and sentenced in the federal courts.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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(Signed) JOSEPH H. DAVIS,
(Signed) J. SEWELL ELLIOTT,
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CERTIFICATE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto.

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20631

L. BUFORD HALL, U. FELTON HALL,
and ERNEST W. HALL,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(April 16, 1964.)

Before MARIS,* GEWIN and BELL, Circuit Judges.

PER CURIAM: The three appellants were jointly indicted, tried, and convicted under a four count felony indictment in the Northern District of Georgia. Count

*Of the Third Circuit, sitting by designation.

I charged them with assaulting a federal officer with a deadly weapon, 18 U.S.C.A. § 111. Count II with the possession, custody, and control of an unregistered distillery, 26 U.S.C.A. § 5601 (a) (1); Count III with making and fermenting mash on premises other than a registered distillery, 26 U.S.C.A. § 5601 (a) (7); and Count IV with possession of a quantity of non-tax paid distilled spirits, 26 U.S.C.A. § 5205 (a) (2) and 5604 (a- (1). Pursuant to the finding of guilt on all counts, Buford Hall was sentenced to a period of five years, Felton Hall to a period of four years and Ernest Hall to a period of two years. Summarized generally, the appellants claim error in the Court's charge with respect to the use of a deadly weapon, failure to define or charge on the rule of self-defense, and the charge of the Court as to the presumption arising from the presence of the defendants at the distillery in question.

Upon a careful review of the record, we have reached the firm conclusion that each of the defendants was lawfully convicted under Counts I and IV of the indictment. The sentences imposed do not exceed the maximum that could have been imposed under either Counts I or IV. In view of the foregoing conclusion, it is not necessary to reach a decision as to the errors alleged with respect to the proof and conviction under Counts II and III. *Morales v. United States* (5th Cir. 1956), 228 F. 2d 762; *Walker v. United States* (5th Cir. 1960), 285 F. 2d 52; *Gorman v. United States* (5th Cir. 1963), 323 F. 2d 51.

The judgment is AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 286

L. BUFORD HALL, L. FELTON HALL, and ERNEST W. HALL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-18; II R. 488-489)[1] is reported at 330 F.2d 558.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1964 (II R. 490). A petition for rehearing (II R. 491-495) was denied on May 22, 1964 (II R. 496). On June 18, 1964, Mr. Justice Black extended

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[1] "R." designates the two-volume record on file with the Clerk of this Court.

the time for filing a petition for a writ of certiorari to and including July 15, 1964, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence supports petitioners' convictions under either of two counts of the indictment.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, petitioners were convicted on each count of a four-count indictment charging them with forcibly assaulting an Internal Revenue agent with a dangerous weapon in violation of 18 U.S.C. 111 (count one), and with violating the provisions of the Internal Revenue Code relating to distilled spirits (counts two-four) (I R. 2-4, 23-24; II R. 481-482).[2]

1. The evidence at trial showed that on the evening of September 2, 1962, an Internal Revenue agent discovered a temporarily inactive illegal distillery in a heavily wooded area in Clayton County, Georgia. While at the site, the agent placed some "flourescent paste" on the handle of a shovel and on other equipment which he found there (II R. 295-296). Thereafter, on the night of September 24, other agents checked the site and found fermenting mash fit for distillation and the still set up and ready to operate (I R. 189-190, 203).

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[2] Count two charged possession, custody and control of an unregistered still and distilling apparatus (26 U.S.C. 5601(a)(1)); count three charged the fermentation of mash on unauthorized premises (26 U.S.C. 5601(a)(7)); and count four charged knowing possession of distilled spirits in containers not having the requird stamps affixed thereto (26 U.S.C. 5604(a)(1)) (I R. 3-4).

The following evening, federal agents returned to the vicinity of the still and heard sounds which indicated that the still was in operation. They also saw a large truck parked in the area and on several occasions witnessed men carrying flashlights walking to and from the truck from the direction of the distillery (I R. 136-138, 191-192; II R. 233-236). At about 10:30 p.m., some men were seen to come from the direction of the still, enter the truck and start to drive it away with the lights off (I R. 141, 192-193). At this point, Internal Revenue Agent Howell stepped from behind a tree into the path of the slowly-moving truck, turned his flashlight on, and, in a loud voice, shouted that he was a federal officer. He ordered the occupants (who turned out to be the petitioners) to stop the truck (I R. 143, 156-157; II R. 235-236). Instead of heeding this command,[3] the truck's headlights were put on and it was accelerated in Howell's direction. The agent jumped aside and leaped onto the running board on the passenger side of the truck and again told the occupants that he was a federal officer and that they should stop (I R. 143, 158, 217 ; II R. 250, 394-395). The two passengers (L. Buford Hall and Ernest W. Hall (I R. 209; II R. 431))[4] attempted to pull Howell into the cab of the truck, and struck him numerous times about the face and head with some "metal object" (I R. 143-144; II R. 402-403). While the struggle continued with the truck still moving, agent Howell pulled his revolver and again ordered petitioners to stop (I R. 144). The occupants then attempted to seize the agent's

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[3] Petitioner Ernest W. Hall testified for the defense that no such identification was made, nor such command given (II R. 432-433).

[4] Petitioner L. Felton Hall was driving the truck (I R. 209; II R. 431).

gun and, in the scuffle, a shot was fired. The agent fired several more shots into the cab and was then knocked off the truck by the occupants, or pulled off by an adjacent barbed wire fence. After he fell, the truck was apparently driven over his right forearm and hip. As a result of his injuries the agent was hospitalized (I R. 144-146, 170-172, 196; II R. 237). The truck was then driven away.

Some time later, the truck was discovered parked in the rear of the residence of a relative of petitioners (II R. 262). Inside the truck the agents found a shovel, a flashlight and some clothing (II R. 263, 304). Examination of the shovel and clothing revealed that they bore fluorescent material identical to that placed by the federal officer on the shovel and other items found at the still on September 2, 1962 (see *supra*, p. 2; II R. 295-296, 305, 325). Additionally, fragments of a "dough like" substance, similar to the kind found at the distillery, were discovered on the flashlight and on articles of clothing worn by petitioners (I R. 199, 209-211; II R. 264, 376-382, 388-389). Moreover, "unusual boot-prints" found by the officers at the still-site on September 24, and 26, 1962, were similar to prints made by the boots of petitioner L. Buford Hall (I R. 189-190; II R. 330, 366, 369).

The distillery itself was in operation on the night of the assault on agent Howell and was found to consist of two stills, a quantity of mash fit for distillation, and over 250 gallons of whiskey. There was no sign posted to indicate that the distillery was registered, nor did the barrels containing the whiskey have the requisite tax stamps affixed (I R. 199-200; II R. 297-298, 308, 311, 329-330).

Petitioners' defense, primarily presented in the testimony of petitioner Ernest W. Hall, was that on the evening of the assault the petitioners were fishing in an adjacent pond and had nothing to do with any still; that while they were driving in the truck away from the pond they heard a pistol shot; that four other shots fired at them followed in rapid succession; and that they heard no one announce he was a federal officer or tell them to stop before the shots were fired, nor did they know that the person who fired the shots was a federal agent (II R. 426-443; 420-423).

2. In his instructions to the jury relating to the charge contained in count one (assaulting a federal officer with a deadly weapon) the court stated, *inter alia* (II R. 466, 477):[5]

> Now there are three essential elements that are required to be proved in order to establish the offense charged in the first count in the indictment:
>
> First: The act or acts of forcibly assaulting an investigator for the Alcohol and Tobacco Tax Division of the Internal Revenue Service while such officer was engaged in the performance of his official duties, as charged:
>
> Second: The act or acts of using a deadly or dangerous weapon, as charged, in the commission of the alleged forcible assault; and
>
> Third: Doing such act or acts willfully.

Defense counsel excepted to the charge requesting, *inter alia*, that the jury be informed that before they "would be authorized to convict on Count one, they

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[5] The court gave the instructions on count one twice—the second time at the request of the jury (II R. 474).

must first find that the defendants knew that the person assaulted was a federal officer; and also that defendants knew such officer was in the discharge of his official duties" (II R. 479). The court refused to so charge.

ARGUMENT

As the court of appeals held, there is no need to examine into the validity of petitioners' convictions on counts two and three of the indictment—charging possession, custody and control of an unregistered still (count two) and fermentation of mash in unauthorized premises (count three)*—since the general sentences imposed on each of the petitioners is fully supportable on either count one of four. *Claassen* v. *United States*, 142 U.S. 140, 146-147; *Pinkerton* v. *United States*, 328 U.S. 640, 641-642, n. 1; *Emspak* v. *United States*, 349 U.S. 190, 195, n. 9.

As for count one—forcibly assaulting an Internal Revenue agent with a dangerous weapon—the jury could find from the evidence that petitioners had severely beaten agent Howell with a "metal object" and driven over him with a truck, even after he had made known to them his identity as a federal officer and

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* With respect to these two counts the jury was charged, in accord with the statutory presumptions contained in 26 U.S.C. 5601(b)(1) and (3), that unexplained presence of petitioners at the still site authorized, but did not require their conviction (II R. 469-470).

The question as to the constitutionality of the presumptions embodied in 26 U.S.C. 5601(b)(1) and (2) is presently pending before this Court on a writ of certiorari to the Court of Appeals for the Fifth Circuit in *United States* v. *Barrett*, No. 13, O.T., 1964. The government had also filed a petition for writ of certiorari from the Second Circuit decision in *United States* v. *Romano*, No. 172, O.T., 1964, involving the constitutionality of the presumption contained in 26 U.S.C. 5601(b)(4) as well as subsection (b)(1). The court below had held the presumptions contained in (b)(1) and (2) unconstitutional in *Barrett*.

ordered them to stop the vehicle. (See Statement, *supra*. pp. 3-4.) Petitioners argue (Pet. 10-12) that the trial court gave an inadequate instruction on knowledge, in that it failed to charge that in order to convict on count one, the jury had to find that, at the time of the assault, petitioners knew that Howell was a federal officer in the discharge of his duties. While earlier cases in the Fifth Circuit support the view that the jury must so find, (*e.g., Hall* v. *United States,* 235 F. 2d 248; *Carter* v. *United States,* 231 F. 2d 232, certiorari denied, 351 U.S. 984; *Hargett* v. *United States,* 183 F. 2d 859[7], a more recent decision in the Fifth Circuit has, at least by implication, rejected this view and ruled that 18 U.S.C. 111 does not require "that the doer of the act have knowledge that the person who is assaulted, resisted, opposed, impeded, intimidated, or interfered with is a federal officer". *Bennett* v. *United States,* 285 F. 2d 567, 569-570, certiorari denied, 366 U.S. 911; see also, *McNabb* v. *United States,* 123 F. 2d 848, 854-855, (C.A. 6), reversed on other grounds, 318 U.S. 332 (relating to the killing of an officer); *United States* v. *Bruce,* 33 F.R.D. 133, 135 (N.D. Miss.); *United States* v. *Combs,* 73 F. Supp. 813, 814 (E.D. Ky.); cf. *Hanis* v. *United States,* 246 F. 2d 781, 785 (C.A. 8). Obviously the later rulings are sound; if it is established that the defendant committed an assault—itself, a criminal act—the statute requires only proof that the victim was in fact an officer engaged in the performance of his duties.

This Court's decision in *Pettibone* v. *United States,* 148 U.S. 197, on which petitioners rely (Pet. 10), is

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[7] There are also district court decisions to that effect. *United States* v. *Miller,* 17 F.R.D. 486 (D. Vt.); *United States* v. *Bell,* 219 F. Supp. 261 (E.D. N.Y.); see also *Sparks* v. *United States,* 90 F. 2d 61 (C.A. 6).

not to the contrary. *Pettibone* involved the entirely different situation of a charge of conspiracy to obstruct administration of justice. Obviously, where, as in *Pettibone,* the essence of the crime is an agreement, there must be knowledge of the unlawful purpose.

In any event, petitioners' convictions are wholly sustainable on count four charging possession of distilled spirits in containers not having the requisite tax stamps affixed. The evidence showed that over 250 gallons of whisky in unmarked barrels were found at the still. That this alcohol was in petitioners' possession within the meaning of the statute was shown by the following facts: fluorescent material placed on equipment at the still was found on a shovel and clothing found in the truck driven by petitioners; a "dough like" substance used at the still was found on a flashlight in the truck and on clothing worn by petitioners (see Statement *supra,* p. 4); and it appears that petitioners were the only persons present there. In short, there was ample evidence from which the jury could find that petitioners were the operators of the illegal distillery and possessors of the untaxed alcohol found at the still-site.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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